

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2009 MSPB 9**

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Docket No. CH-0831-08-0716-I-1

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**Willie L. Lamb,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

OPM Claim No. CSA 4 239 364

February 3, 2009

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Willie L. Lamb, Cincinnati, Ohio, pro se.

Cynthia Reinhold, Washington, D.C., for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review of an initial decision that dismissed his appeal as untimely filed with no good cause shown. For the reasons set forth below, we GRANT the petition for review under [5 C.F.R. § 1201.115](#)(d), REVERSE the initial decision, and REMAND the appeal for further adjudication.

### BACKGROUND

¶2 The agency issued a decision, dated June 24, 2008, to recompute the appellant's Civil Service Retirement System (CSRS) annuity to exclude credit for his post-1956 military service when he became eligible for Social Security benefits at age 62. Appeal File (AF), Tab 1. The appellant filed an appeal of the decision on August 13, 2008, utilizing the Board's e-filing system. *Id.*

¶3 The administrative judge (AJ) to whom the appeal was assigned issued an Order on Timeliness on August 14, 2008, directing the appellant to show that his appeal was timely or that there was good cause for his untimeliness. AF, Tab 3. The appellant responded by stating that he had "filed an e-appeal . . . on July 23," but that he had not electronically submitted it because he was unaware that he could do so without submitting all relevant documentation. AF, Tab 4 at 3. He stated that he waited for further instructions from the Board; that, when he did not hear from the Board in what he considered a reasonable amount of time, he called "to find out what was going on"; that he spoke to a staff member in the Office of the Clerk of the Board (OCB); and that, when the staff member advised him to refile his appeal, he did so. *Id.*

¶4 The appellant also submitted a copy of an August 20, 2008, email<sup>1</sup> from the OCB staff member to whom he had spoken, stating as follows in pertinent part:

In our telephone conversation today, you said that you thought you had filed an appeal online on July 23, and wanted to know if the MSPB has any documentation that could substantiate that. . . . The Appeal Event Log (HTML format) shows that you started an appeal (#200802052) on July 23, but this appeal was not submitted. It is still in the e-Appeal system in an "in process" status. . . . The Appeal Event Log also indicates that you started and completed a new appeal (#200802295) on August 13, which is the appeal that was received for adjudication.

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<sup>1</sup> The copy provided by the appellant is not dated. The Board's email system, however, shows that the email was sent August 20, 2008.

*Id.* at 8. The agency did not respond to the AJ's Order on Timeliness, nor did it address the issue of timeliness in its later submission of the substantive agency response file. AF, Tab 7.

¶5 The AJ issued an initial decision dismissing the appeal as untimely filed without good cause. AF, Tab 8. He found that the appeal was untimely because the appellant was presumed to have received the agency decision on June 30, 2008, and because, although he started the electronic filing process on July 23, he did not submit the appeal until August 13, more than 30 days after his receipt of the agency decision. *Id.* at 2-3. The AJ held that the appellant did not show good cause for his untimeliness because he could have submitted documentation by nonelectronic means. *Id.* at 3.

¶6 The appellant has filed a petition for review in which he asserts that he thought the appeal was timely filed. Petition for Review File (RF), Tabs 1, 3. He states that he validated his appeal on July 23, 2008, mistakenly considered that to be a submission, and would have completed the process at that time if he understood that he needed to do so. *Id.*, Tab 3 at 1. The appellant also argues that the AJ erred in not considering the email from the Board staff member. *Id.*, Tab 1 at 4.<sup>2</sup> The agency has filed a response in opposition to the PFR. *Id.*, Tab 5.

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<sup>2</sup> In addition, the appellant argued that he was caring for his wife "during this time" and that she required 24-hour supervision because of severe receptive and expressive aphasia. RF, Tab 3 at 1. He also submitted documentation that his wife was hospitalized from July 8 through 22, 2008. *Id.*, Tab 1 at 6. The Board, however, will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). We therefore do not consider the appellant's argument and evidence regarding his wife's condition in reaching our decision.

### ANALYSIS

¶7 Generally, a Board appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later. [5 C.F.R. § 1201.22\(b\)\(1\)](#). The date of filing by e-filing is the date of electronic submission. [5 C.F.R. § 1201.4\(l\)](#). The appellant's statement and the Board's e-appeal Event Log show that on July 23, 2008, seven days before his appeal was due, the appellant created a new appeal on the e-filing section of the Board's website. *See* AF, Tab 4 at 3; RF, Tab 3 at 1. The appellant did not file this appeal, however, because he did not complete the electronic submission. *See Rodgers v. U.S. Postal Service*, [105 M.S.P.R. 297](#), ¶ 5 (2007). The appellant ultimately filed an appeal on August 13, 2008, which was 14 days past the deadline. AF, Tab 1.

¶8 The Board will dismiss an appeal that is untimely filed unless the appellant shows good cause for the delay. [5 C.F.R. §§ 1201.22\(c\)](#), 1201.56(a)(2)(ii); *Peterson v. Department of Health and Human Services*, [50 M.S.P.R. 237](#), 242 (1991), *aff'd*, 976 F.2d 747 (Fed. Cir. 1992) (Table). To establish good cause for the untimely filing of an appeal, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *See, e.g., Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). "To determine whether an appellant has shown good cause [for an untimely filing], the Board will consider (1) the length of the delay, (2) the reasonableness of his excuse and his showing of due diligence, (3) whether he is proceeding *pro se*, and (4) whether he has presented evidence of circumstances beyond his control that affected his ability to comply with the time limits, or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file his petition." *McClendon v. Office of Personnel Management*, [92 M.S.P.R. 250](#), ¶ 8 (2002); *see also Moorman v. Department of the Army*, [68 M.S.P.R. 60](#), 62-63 (1995), *aff'd*, 79 F.3d 1167, (Fed. Cir. 1996) (Table).

¶9 Under the circumstances of this case, we find that the appellant's lateness should be excused. On July 23, 2008, the Board's records show, the appellant was assigned an appeal number and completed all the questions on the on-line form on the Board's website. After doing so, one is able to exit the website without a clear warning that his appeal has not been filed, as the Board previously held in *Rodgers*, [105 M.S.P.R. 297](#), ¶ 9. *See also Livingston v. Office of Personnel Management*, [105 M.S.P.R. 314](#), ¶ 9 (2007). As we have indicated above, the appellant asserted on appeal, and reiterates on PFR, that he thought he had filed his appeal on July 23, 2008. Under similar circumstances, the Board has held that there is good cause for an untimely filing, because an individual could reasonably believe that he filed his appeal on the date he initiated it online. *See Rodgers*, [105 M.S.P.R. 297](#), ¶¶ 7-9. We find that the appellant in this case has shown that he reasonably believed he had filed his appeal in a timely way. Furthermore, he acted with due diligence by calling the Board after what he considered a reasonable period of time without a response to his appeal and by refiling the appeal on August 13, 2008, when he became aware there was a problem. *See Livingston*, [105 M.S.P.R. 314](#), ¶ 9 (2007). In addition, OPM has not shown or even alleged that it would be prejudiced by the filing delay. *Cf. Killian v. Office of Personnel Management*, [100 M.S.P.R. 583](#), ¶¶ 3, 6 (2005) (where a *pro se* appellant misdirected her appeal, she "should not be denied an opportunity to have her case heard on the merits where the intention to file an appeal within the Board's time limit was clear and there was a lack of evidence indicating that OPM would be prejudiced by granting the waiver.").

¶10 Finally, we note that the Board has placed a high priority on resolving retirement benefit cases on the merits. *See Karker v. Office of Personnel Management*, [80 M.S.P.R. 235](#), ¶ 9 (1998). Retirement cases are not adversarial proceedings in the sense that adverse actions are, and thus "any doubt as to whether the Board should waive the filing deadline for an adjudication on the merits should be resolved in favor of the appellant . . . ." *Id.* (citing *Edney v.*

*Office of Personnel Management*, [79 M.S.P.R. 60](#), 61-63 (1998)). We therefore find good cause for the filing delay in this appeal and waive the deadline.

ORDER

¶11 Accordingly, we REVERSE the initial decision dismissing the appeal as untimely filed without good cause and REMAND the appeal for further adjudication, including the hearing requested by the appellant.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.